NO. 16335

United States
Court of Appeals
for the Ninth Circuit

DEWEY J. O'BRIEN,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE

Appeal from the United States District Court
for the District of Oregon

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OPINION BELOW

The court delivered a written opinion (R. 20-25) reviewing authorities and concluding that under the law of Oregon the appellee would not be charged with negligence under the facts of this case.

JURISDICTIONAL STATEMENT

Appellant commenced action under the Federal Tort Claims Act (28 USCA §§ 1346(b) and 2674) for damages, claiming injury from a tree which fell from forest land across a state highway. Appellee asserted the District Court's lack of jurisdiction by its Contentions III (R. 14 and VI (R. 15) and the question was reserved in the pretrial order as an issue of law (No. V, R. 16, 17). The basis of this assertion by appellee was the discretionary function of the government's failure to provide funds for the inspection and elimination of roadside hazards to the traveling public (R. 50, 66, 67).

This appeal is asserted under 28 USCA § 1291.

QUESTIONS PRESENTED

(1) Under the law of Oregon did the appellee landowner have a duty to inspect trees on its vast holdings of rural forest lands growing in their natural state along many miles of abutting public highways maintained and patroled by the State Highway Department, which had a practice of observing, and with permission, cutting danger trees along such public highways?

(2) Would the landowner's failure to inspect under such circumstances in itself be negligence?

(3) If the appellee was negligent, did the appellant sustain his burden of showing appellee's negligence to be the proximate cause of appellant's injury?

(4) Was the failure to provide funds for the removal of such trees a discretionary function, and any injury resulting therefrom not actionable under the Federal Tort Claims Act?

Question (4) need not be reached if the Court finds, as the District Court did, that the injury to the appellant was not caused by the negligence of the United States or its employees.

STATUTES INVOLVED

28 USCA § 1291

> "*Final decision of district courts.* The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 USCA § 1346(b)

> "Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclu-

sive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

28 USCA § 2674

"*Liability of United States.* The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

"If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof."

28 USCA § 2680(a) and (b)

"*Exceptions.* The provisions of this chapter and section 1346(b) of this title shall not apply to - -

* * *

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in

the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * *

"(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

FEDERAL RULES OF CIVIL PROCEDURE, TITLE 28, USC

"Rule 52. FINDINGS BY THE COURT. (a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purpose of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule

41(b). As amended Dec. 27, 1946, eff. March 19, 1948."

STATEMENT OF THE CASE

November 13, 1956, a tree fell from rural forest land owned by the appellee and administered by the United States Forest Service, an agency of the U. S. Department of Agriculture. The tree was situated about 84 feet upward from a road abutting the defendant's land and about 112 feet from the center line of the 22-foot road (R. 36, 37, 42). The tree fell across the road and hit the car in which appellant was riding.

The tree was growing in a natural National Forest in its natural state in a rural area a few miles westerly from the town of Oakridge, Oregon. Its existence and condition were not known to agents of the defendant. The Forest Service had not undertaken the policing or inspection of rural forest lands abutting highways maintained by other public agencies to protect the traveling public against the possibility of injury from such trees and funds had not been made available therefor (R. 50, 66, 67).

On the other hand, the State of Oregon highway representatives had and have a practice and policy of patroling such public highways and calling to the attention of the abutting owners, including the defendant, trees considered by the Highway Department to be dangerous to

the safety of travelers on the public highways, including this public highway at the time of the accident (R. 76; and see Defs. Exs. 1-17, incl., 21, 27-34, incl.) and of removing them with the permission of the Forest Service.

Appellant sought to charge the appellee with liability for damage caused by the falling tree, which appellant claimed was visible from the highway and would by inspection have been found dead, because appellee had not inspected the tree before the accident.

Appellee's evidence showed that the tree had not been inspected before the accident, and that it was not in a place to be observed except under unusual circumstances, but that the State of Oregon Highway Department patroled and maintained the road, including observation of danger trees on abutting lands in connection with its appropriate duty of assuring the safety of the roads to the traveling public, and generally requested and obtained permission to cut trees believed dangerous, both live and dead. Appellee further offered evidence that a dead tree is not necessarily a dangerous tree and that no funds had been provided for the inspection and cutting of danger trees along such public roads. Further, evidence was introduced to show the many thousands of acres of land and miles of road traversing the same that the Forest Service administers in Oregon.

The trial court held *inter alia* that "*Under the facts of this case* the United States and its employees had no duty

to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed" and that the appellant's injury was under Oregon law not caused by the negligence of appellee or its employees (R. 29). (Emphasis supplied)

ARGUMENT

Appellant's ingenious but esoteric argument and appellate theory is summarized in his statement:

> "A duty in law is not at all the same kind of moral imperative as is a duty in ethics or religion. It is merely a correlative of the right of plaintiff to travel safely. When we place upon a landowner a duty to inspect, we do not necessarily intend or expect that he will in fact make an inspection. We are simply placing upon him the economic burden of any loss which may be caused by a disaster which could have been avoided had he done so." (App. Br. 11)

Appellant avoids the Court's very important words "*Under the facts of this case,* the United States and its employees had no duty to inspect its property or objects thereon for the purpose of insuring that the highway would not be so obstructed." (Emphasis supplied).

Reasonably, this Conclusion of the Court is a concise statement of the proposition that the Court has concluded that a reasonable, prudent landowner would not have in-

spected, and therefore the appellee's employees were not negligent in not inspecting — i.e., had no duty to inspect. "Duty" in ordinary negligence cases is translatable into the conduct of a reasonable, prudent landowner under like circumstances. Higher duty is imposed in certain type cases relied on by appellant relating to activities of common carriers inviting a special duty, and to employers engaging in hazardous industry upon whom statutes impose special employer's liability duties or cases involving merchantability of consumer goods. Those situations and cases are not comparable to the one at bar.

Appellee respectfully urges that a reasonable, prudent landowner would not have inspected the trees near the roadway because:

(1) The agency charged with operation of the roads and the safety of the traveling public had assumed and was charged with and exercising the function of inspection.

See *Chambers v. Whelen,* 4 Cir. 1930, 44 F. 2d 340 at 341-342, wherein the Court said:

> "While the fact that a duty is imposed upon public officials to maintain the safety of a street or highway does not necessarily absolve an abutting owner from duty with respect thereto, it is at least worthy of note that the Legislature of West Virginia has imposed upon the highway officials of that state the duty of removing all dead timber standing within fifty feet of a highway (Barnes West Virginia Code, c. 43, § § 21,

71, and 122), and that no such duty is imposed upon the landowner. On the contrary, the only statutory provision affecting the landowner in such matters is section 187 of chapter 43 of the Code, which makes it a misdemeanor to 'kill a tree and leave it standing within a distance of fifty feet of any public road,' a provision which imposes liability, criminal as well as civil, where the death of the tree is due to the act of the landowner, but has no application where it has died as a result of natural causes. In the early days of the Republic, the mere suggestion that it was the duty of a landowner to inspect trees on rural lands would have excited ridicule. Subsequent legislation in West Virginia has placed the duty, not on the landowner, but on those whose duty it is to maintain the safety of the highways.

"This statutory policy touches, we think, the real heart of the question. The inspection and removal of trees standing near a highway is, in substance, not a matter affecting the use of the abutting property, but a matter affecting the safety of the road. While, of course, it is the duty of abutting owners not to create or maintain upon their premises what may be a source of danger to travelers on the highway, it is the duty of the highway officials, and not the duty of abutting owners, to make the highway safe for the use of the public; and the duty of inspection would seem to rest upon those whose duty it is to make the highway safe. It is hardly thinkable that by building a country highway through the lands of a private owner, the public should impose upon him the duty of inspecting trees or other objects for the purpose of making the highway safe.

* * *

"The removal of such as may become dangerous through decay is not a matter of interference with private property, as in the case of removal of a building or of an ornamental shade tree, but is a mere matter of maintaining the safety of the highway, a duty imposed by law upon the road officials, which the owner of the property has a right to assume that they have performed. To hold, in such case, that the duty of inspection exists, would be to charge the owner with responsibility for dangers arising from the natural condition of the country through which the road runs. Is the owner of mountain land to be held liable for failure to inspect because a boulder rolls from his land on the mountain side to the highway, or because there has been a landslide, or because water flowing in natural course from his land has frozen upon the highway? If not, we see no ground upon which liability in a case such as this can be imposed."

The remarks of the author in *Prosser on Torts,* West Publishing Co., 1941, at page 605, are also appropriate:

"The traditional rule of the English and American courts has been that the possessor of land is under no affirmative duty to remedy conditions of natural origin upon his premises, although they may be dangerous or inconvenient to his neighbors. Thus it has been held that he is not liable for the existence of a foul swamp, for the spread of weeds or thistles growing on his land, for the normal flow of surface water, or for the fall of a decayed tree upon a public road or an adjoining house. Closely allied with this is the generally accepted holding that an abutting owner is under no duty to remove ice and snow which has fallen naturally upon

> the highway. On the other hand, if he himself altered the condition of his premises, as by erecting a structure which discharges water upon the sidewalk, damming a stream so that it forms a malarial pond, planting poisonous trees near his boundary line, or piling sand where the wind may blow it, the condition is no longer a natural one and he may be liable for the damage resulting from his negligence.
>
> "The rule of non-liability for natural conditions was obviously a practical necessity in the early cases, when land was very largely in a primitive state. It remains a necessity in rural communities, where the burden of inspecting and improving the land would be out of all proportion to the harm usually threatened."

(2) The risk of danger in a rural area was so small as to make inspection by the landowner of vast timber holdings a burden or duty unreasonable under the conditions existing herein.

(3) A dead tree is not necessarily a dangerous tree and thus inspection would not necessarily or reasonably insure the safety of the traveling public and thus a reasonable, prudent landowner would be unlikely to undertake inspection.

(4) Appellant concedes that: "As a practical matter, it is most unlikely that such inspection would be made . . ." (App. Br. 12). Appellant would require the impractical and label it negligence to not be impractical. Appellant would emphasize unduly the benefits of hindsight and

minimize standards of reasonable conduct.

Appellant argues for application of the Standard of Reasonable Care, contrary to his argument calling for the imposition of a special duty and a balancing of hardships (App. Br. 15).

The Court, appellee submits, has carefully applied the standard of reasonable care, and concluded that under the facts of this case, the employees of appellee had no knowledge of what ultimately proved to be a hazard, there was no negligence and no standard of reasonable care violated. The Court's opinion points out the division of the cases. It is argued that the cases aligned with the Court's holding arose in jurisdictions and under circumstances much more similar to the rural setting involved herein, common to Oregon law and its development, than did those *contra.* The former cases are therefore most persuasive, as are ordinary judgment and reason, for the Court's opinion. Appellee submits that the Court's opinion (R. 22-24) ably and fully treated the appropriate reported cases available for guidance.

What appellant seeks by a standard of reasonable care is implicitly found already in the Opinion, Findings and Conclusions of the trial court. Appellant suggests that the entire case was tried on an erroneous theory. The record does not support appellant's assertion. The Court received all testimony offered concerning the condition of the tree

and its location and observability. Appellant was not precluded from introducing any evidence at the trial on a theory preconceived concerning duty to inspect. The Court's Findings and Conclusions entered after mature consideration of the facts and the law, are that *under the facts of this case* the landowner had no duty to inspect and that no act or omission of appellee's employees wrongfully or negligently proximately caused appellant's injury.

The record does not support the statement (App. Br. 4) that the trial court determined that there was no duty imposed upon the owner of land adjoining a highway to inspect timber growing thereon for the purpose of safeguarding travelers upon the highway. The record supports a much narrower statement that the Court as trier of the *facts* and the law found as a fact that under the facts of this case the failure to inspect was not negligence — that under the facts of this case there was not reasonably to be imposed a duty absolute of inspection by the landowner of its natural rural forest lands bordering on public roads. The Court carefully points out the great burden such a duty would involve and further emphasizes the role of the State of Oregon Highway Department in assuming the burden of protection of the traveling public.

Actionable, ordinary negligence involves conduct which does not measure up to the test of the actions of a reasonable, prudent man under the same or similar conditions. If

one falls below that standard of action or care in such a manner as to cause injury to another, he may be said to have breached his duty to the injured party to exercise such care. He has no duty to do more than exercise the care of an ordinary, reasonable, prudent person acting under the same or similar conditions.

Implicit, then, in the Conclusion of Law No. 2, is the implication that a reasonable, prudent landowner would not have inspected the property "under the facts of this case", and therefore the defendant had no duty to do so. A conclusion of law need not be a treatise on the mental workings of the Court, but need only summarize the Court's application of the facts to the law.

The appellant would convert the failure of the appellee to inspect into negligence *per se.* The assertion is made that appellee had at least constructive notice of the danger from the dead tree, without any factual reference supporting the assumption. The existence of the tree, which the evidence showed was in fact not known to defendant's employees, is no basis on which to attribute even constructive notice to appellee.

The Court did not discuss, of all cases cited involving falling trees, the case of *Brown v. Milwaukee Terminal Ry. Co.,* 199 Wis. 575, 224 NW 748, 227 NW 388 (1929). At most, the case can be said to be one of those opposite the *Chambers v. Whelen* case, *supra,* and others which the

Court could properly choose to follow, particularly on their facts and the facts herein. Furthermore, as appellant acknowledges, therein the setting was an urban area, and the jury, in response to a specific interrogatory, found (we submit *under the facts therein*) that the tree was dangerous and that the defendant should have known it in the exercise of ordinary care in time to remove it. Herein the Court found that there was no negligence, i.e., that in the exercise of ordinary care, the appellee's employees would not have found the danger. That this is so because the Court found that ordinary, prudent landowners acting under these circumstances would not have inspected so as to have found it, does no violence to the *Brown v. Milwaukee, supra,* verdict that under the facts of that case a reasonable, prudent landowner would or should have known of that patently dangerous urban area tree, which was growing between a street curbing and sidewalk in the City of Milwaukee. The divided court first reversed the plaintiff's verdict and on rehearing affirmed it, holding that the complaint alleged and the verdict found facts amounting to nuisance. No nuisance in the case at bar is alleged, and the facts before the trial court and now before this Court do not support a proposition of maintenance of a nuisance by permitting such a rural tree in its natural state to remain standing.

Appellant urges judicial legislation to create a duty,

thereby implying, appellee asserts, correctly, that none was imposed before (App. Br. 17). He seeks to found this duty on a concept of balancing hardships. Such a concept is beguiling, but in the case herein should be crushed under the impact of its consequence, as the trial court's opinion points out.

In one hundred years of Oregon statehood, not one such case has been reported in Oregon Supreme Court litigation. The burden, then, of requiring such inspection is one all out of reason to the risk to the wayfarer. It is not the function of negligence law to impose liability without fault to provide accident insurance for the travelers on the public ways.

As this Court has aptly stated in *Union Pacific RR Co. v. Johnson,* 9 Cir. 1957, 249 F. 2d 674, at 679:

> "Of course, in negligence cases there is always a certain amount of economic determination. It is perfectly foreseeable when one builds a railroad that at various country crossings negligent drivers will get their entirely innocent passengers on the crossing and get them killed by carefully driven trains. It is foreseeable that open country irrigation canals will prove attractive nuisances to children. Yet, without more we do not generally hold the railroads or canal companies in such cases. And we think the reason is that the world must go on and we do not impose a duty."

Appellant argues that Oregon law *(Schweiger v. Sol-*

beck, 191 Or. 454, 230 P. 2d 195 (1951)) contrary to the implication of the trial judge's opinion, has no reluctance to impose upon the lumber industry the burdens of so operating its business as not to cause injury to others. Appellee submits the case is not in point and appellant's interpretation of the trial court's opinion unfounded. The *Schweiger* case, *supra,* involved a created, artificial condition occasioned by logging. The trial court's opinion herein did not involve immunity for the lumber industry for artificially-created conditions, but more narrowly held that it would be unthinkable that the Oregon courts would impose upon the owners of forest lands (in their natural state in this case) adjacent to little-used roads in sparsely-settled areas, the duty to inspect and remove trees which are likely to fall because of natural decay.

The core of appellant's argument that the Court should by judicial legislation impose a duty of inspection is his assertion that a balancing of consequences should impose liability on the landowner because the landowner may obtain economic benefits from the standing forests. Appellant would substitute for a standard of due care, a standard of proportionate economic loss after an accident has occurred. Such a standard is unsupportable. Such doctrine ill becomes a philosophy of equal justice under law, which is the proud heritage of this nation, and the occasional, unavoidable, imperfect application of which is a torment to the judiciary.

Appellant's argument would require a liability not founded on negligence but on beneficial ownership, and perhaps require evaluation of the actual economic benefit to the owner as compared to the harm done the wayfarer. This departure is startling to contemplate.

The lip service necessarily given to an unchanging standard of care (App. Br. 16) accents the frailty of appellant's basic attack on the Court's opinion.

As the Supreme Court of the United States has stated in discussing the Tort Claims Act:

> "Its effect is to waive immunity from recognized causes of action and not to visit the government with novel and unprecedented liabilities."

See *Feres v. U.S.,* (1950) 340 U.S. 135, at 142.

The case at bar was determined by the Court at a trial on the facts. The pretrial order conceded that no inspection had been made, but the question as to whether that lack of inspection involved negligence was resolved by the Court not as a question of law but as a fact, after hearing evidence of the circumstances, applying the standards of due care and considering the factors which would probably motivate a decision of an Oregon court in applying the facts to the law.

The able trial judge, experienced and well-informed on Oregon law, the Chief Judge of the United States District

Court for the District of Oregon, made Findings and Conclusions which should not be disturbed. There is ample evidence supporting his Findings, and his Conclusions are entitled great weight as interpretive of the law of the District wherein he sits. See *Henderson Co. v. Thompson,* (1937) 300 U.S. 258, at 266, wherein the Supreme Court has said:

> " . . . . in the absence of a definitive construction of the Constitution of the State by its highest court, we should defer to the federal court's understanding of the state law."

See also, *Pauling v. Pauling,* 6 Cir. 1947, 159 F. 2d 531 (cert. den. 331 U.S. 808), at 534, wherein the court said:

> "The question is, moreover, one of local law, on which the considered opinion of the trial judge will be accorded great weight by this court."

See also, *Elder v. Dixie Greyhound Lines,* 8 Cir. 1946, 158 F. 2d 200, at 204-5; *Citrigno v. Williams,* 9 Cir. 1958, 255 F. 2d 675, at 679, and *Bower v. Bower,* 9 Cir. 1958, 255 F. 2d 618, at 619.

Furthermore, the Court of Appeals should not disturb the Findings made by the trial court unless they are clearly erroneous. See *Kimberly Corp. v. Hartley Pen Co.,* 9 Cir. 1956, 237 F. 2d 294, at 300. Appellee respectfully submits that not only were the findings here not clearly erroneous,

but were clearly correct (See Rule 52(a), Fed. Rules of Civ. Proc.).

Appellant relies on *Sullivan v. Mountain States Power Co.,* 139 Or. 282, 298 P. 2d 1038 (1932). The case involved a forest fire found to have been caused by a falling tree's coming into contact with electrical transmission lines. The Court in that case emphasized the

> " . . . . duty of the defendant to have used due care commensurate with the extremely dangerous character of the force it was engaged in transmitting in maintaining its wires . . . . " citing from *Greenwood v. Eastern Oregon Power Co.,* 67 Or. 433, 136 P. 336.

The *Sullivan* case, *supra,* and other electricity cases, involve an artificial, dangerous instrumentality. Electricity cases are not factually helpful herein.

Appellant also relies on *Suko v. Northwestern Ice Co.,* 166 Or. 557, 113 P. 2d 209 (1941). That case involved a water tank atop a building above a busy thoroughfare in a large metropolis. It was a created, rather than a natural condition. The Court gives a clue to its probable thinking if the facts of this case were before it, when the opinion points out the circumstances

> " . . . . required a greater degree of care in its maintenance and use than would have been the case had it been located in a remote and 'lonely' district."

The tree herein, appellee repeats, was, as the Court opined,

growing in a natural state in a rural forest area — a "lonely" district.

From *Suko, supra*, appellant deducts that the Court herein should have determined whether a reasonable inspection under the circumstances would have discovered the tree, and suggests that an inspection every ten years would be a reasonable burden. The obvious response is that had the Court considered such inspection or duty to inspect reasonable, it would have concluded that under the facts such a duty did exist. The Court found otherwise. The argument is an artful misapplication of the Court's Findings and Conclusions.

Finally, appellant argues that the Court failed to resolve questions of fact as to whether the failure to inspect was the proximate cause of the injuries to the plaintiff (App. Br. 24). Appellee does not so read the record (See Finding of Fact 15, R. 28).

In the pretrial order, appellant asserted liability of appellee charging a failure to warn. This assertion has not been pressed on appeal. It is submitted that in any event it is not chargeable to appellee. See *National Manufacturing Company v. United States*, 8 Cir. 1954, 210 F. 2d 263, cert. den. 347 U.S. 967.

CONCLUSION

The trial court received evidence and made Findings of Fact therefrom. The record indicates no exclusion of evidence offered by appellant. The Court applied the facts to the law of Oregon, wherein the Court was sitting, and rendered Judgment for the appellee. Appellant would require the Court to embark on judicial legislation to impose new and novel liability. There is no basis for disturbing the Court's Judgment. It should be affirmed.

Respectfully submitted,

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August, 1959